Supreme Court, U.S.
FILED
OCT 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-357

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Appellants

v.

JAMES I. SCHEINER, SECRETARY OF THE DEPARTMENT OF REVENUE, *et al.*,
Appellees

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE APPELLANTS

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TABLE OF AUTHORITIES

Cases:	Page
American Trucking Associations, Inc. v. *Gray*, No. 86-358 (U.S. Sept. 3, 1986)	7
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	5
National Can Corporation v. *State of Washington, Department of Revenue*, prob. juris. noted, No. 85-2006 (U.S. Oct. 6, 1986)	9
Pa. Cons. Stat. Ann.:	
§ 75-2617.1 *et seq.*	7
§ 75-9901 *et seq.*	7

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The appeal in this case raises two significant issues concerning the power of a state to impose highway use taxes on interstate motor carriers: first, whether Pennsylvania has violated the Commerce Clause by structuring its axle tax so that the entire incidence of the tax falls on vehicles registered outside the State; second, whether Pennsylvania's marker fee and axle tax are impermissibly discriminatory because their economic effect is to impose a significantly higher per-mile tax cost on trucks registered outside Pennsylvania than on those registered in the State.[1]

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[1] In the Statement of Parties to the Proceeding (J.S. ii), we inadvertently omitted Anderson Trucking Services, Inc., an independ-

Appellees do not deny that these issues are of substantial practical importance both to the states and to the motor carrier industry. Nor do they seriously dispute the factual premises on which this appeal rests—that the burden of the axle tax has fallen exclusively on operators of vehicles registered outside Pennsylvania, and that the nature of the axle tax and marker fee is such that costs per mile decrease with increased use of the State's highways, generally advantaging locally-based vehicles over those registered elsewhere. Instead, they ask the Court to accept their vague and generalized assurances that the axle tax was a fair reallocation of tax burdens, while suggesting that, at least in the area of highway taxes, older decisions of this Court treat highway taxes as a unique exception to the Commerce Clause ban on discrimination.

We submit that appellees' arguments, which are remarkable for their failure to address the specifics of the contentions advanced in the Jurisdictional Statement, wholly fail to refute the need for plenary review by this Court.

1. ***Structural Discrimination.***

Appellants have advanced a straightforward analysis, rooted in the precedents of this Court, in support of the contention that Pennsylvania's axle tax embodies an impermissible structural discrimination against interstate commerce: (a) The states are in general not permitted to impose taxes solely upon interstate commerce or out-of-state businesses; (b) in determining the incidence of a challenged tax, the courts look beyond the face of the specific statute to the overall taxing scheme, so that a facially neutral tax may nevertheless be invali-

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ent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are St. Cloud Truck Sales, K & W Trucking Co., Inc., H.E. Anderson Equipment Leasing, and R.B.J. Industries, Inc.

dated if changes to other provisions of the state's tax laws cause the tax to be imposed exclusively or disproportionately on out-of-state entities; and (c) some taxes exacted solely from interstate commerce may survive Commerce Clause scrutiny if complementary to other taxes imposed only on in-state businesses; but (d) this defense is available to the state only upon a precise showing of equivalence between the challenged tax and the tax for which it is said to compensate, which Pennsylvania has failed to make in this case.

We do not understand appellees to disagree with any part of this analysis except the last, which they attempt to transmute into a materially different and unacceptably lax test, for which they offer no supporting authority. They have therefore utterly failed to carry the burden of justifying the discriminatory structure of the axle tax.

a. The heart of appellees' defense of the axle tax—whose economic incidence, appellees concede (see Mot. to Dis. 7-8), falls almost entirely on operators of vehicles registered outside Pennsylvania—is that the offsetting registration fee reductions for Pennsylvania-based vehicles merely accomplished a redistribution of a tax burden that had previously fallen too heavily on local motor carriers. Appellees invoke (*id.* at 12) the uncontroversial principle that interstate business can be made to pay its own way and accuse us of asking the Court to rule that a state may "never . . . change its tax structure to increase the relative tax burden on interstate commerce" (*id.* at 10).

As we explain shortly, this argument mischaracterizes our position. More fundamentally, however, it is based on little more than repeated, unsubstantiated assertions of its major premise: that the discrimination inherent in the axle tax was necessary to redress a pre-existing imbalance in tax burdens. This begins with the reformulation of the first question presented, which makes the claim

that "the resulting tax distribution [following adoption of the axle tax] still weighs more heavily on intrastate commerce than interstate commerce" (Mot. to Dis. i), and continues in the body of the argument (*e.g.*, *id.* at 14). One looks in vain, however, in the statute itself, in the record, or in appellees' motion for the careful economic analysis that might sustain this key assumption underlying appellees' position. Instead, the sole purpose stated in the statute is to aid Pennsylvania's unemployed (see J.S. App. 84a-85a), while the motion contains nothing more than a vague and general assertion that certain taxes or fees, notably the fee for motor vehicle registration, are directly paid only by Pennsylvania-registered vehicles and are substantial in amount.

Appellants' position, of course, is not that a state is "frozen . . . forever" (Mot. to Dis. 12) in a tax scheme that fails to allocate its burdens fairly between local and interstate commerce. Rather, the important point is that effectuation of the federal constitutional interest in protecting interstate commerce from unfair treatment at the hands of local, parochial interests requires close scrutiny of taxes that appear to fall solely or disproportionately on interstate commerce. The cases cited in the Jurisdictional Statement (at 18-23) show that this Court is not prepared to accept uncritically the word of local or state taxing authorities that there is no unfairness in a facially or structurally discriminatory levy. Rather, the burden is on those authorities to show, by precise and economically meaningful analysis, that the challenged tax compensates for some other tax on essentially identical activities that is paid only by local businesses.[2]

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[2] It is therefore immaterial that Pennsylvania had increased registration fees three years before its adoption of the axle tax and the neutralizing registration fee reductions. See Mot. to Dis. 8 n.2. Those increases—no doubt prompted by the many years of high inflation that had passed since the previous adjustment of registration fees—were plainly no part of a rational and considered plan to allocate the costs of highway maintenance fairly between

Appellees' disclaimer of the relevance of the complementary tax doctrine (Mot. to Dis. 16 n.4) is particularly puzzling, for, as the Supreme Court of Pennsylvania correctly recognized (J.S. App. 33a-34a), it is only that doctrine that can save the validity of a tax like the axle tax. As cases like *Armco* and *Minneapolis Star* make clear, the mere fact that other, larger, and generally similar taxes exist is insufficient to justify a tax challenged because it falls solely or predominantly on a constitutionally protected entity (see J.S. 22). Rather, as shown at J.S. 22-23, the state must demonstrate that the challenged tax compensates directly and precisely for a specific tax imposed on local interests for a substantially equivalent event. By abandoning the rationale on which their victory below was predicated, and by totally ignoring the holdings, reasoning, and implications of the Commerce Clause decisions of the last five years on which appellants relied (see J.S. 19, 22-23), appellees have cut themselves adrift from any even arguable basis for sustaining the axle tax.

Certainly *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), the only case relevant to this issue that appellees even bother to mention, does not support their argument. *Maryland* does indeed hold that the entire taxing scheme must be examined to determine whether a challenged tax actually discriminates against interstate commerce (see *id.* at 756). But this was in the course of finding that Louisiana's first-use tax, though facially neutral, was discriminatory when considered with the rest of the State's tax structure. The Court did not thereby also suggest that the discrimination it had detected could be justified by the mere existence of other taxes that were

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local and out-of-state vehicles. The reductions made in 1983, designed to assure that the burden of the axle tax fell entirely on out-of-state vehicles, were also no part of a rational restructuring of tax burdens, else reductions would also have been made for smaller vehicles to which the axle tax was not applicable (see J.S. 23 n.18).

imposed on locally produced gas. Rather, it then turned to the compensatory tax doctrine as the legal measure of the validity of Louisiana's structurally discriminatory first-use tax (*id.* at 758-759); the tax failed to qualify as a valid compensatory tax in *Maryland* for much the same reasons Pennsylvania's axle tax fails here.

b. Appellees also take issue with our contention (see J.S. 16-18) that the decision below conflicts with decisions of several other state supreme courts. But their bald assertion (Mot. to Dis. 16) that no conflict exists utterly fails to distinguish the decision of the Supreme Court of Vermont in *Conway* striking down a facially neutral Vermont highway tax that was accompanied by offsetting registration fee reductions. In fact, as Vermont recognizes in its pending conditional cross-petition in *Conway*, that decision "is in direct conflict with a subsequently issued decision of the Supreme Court of Pennsylvania upholding an analytically indistinguishable taxing scheme" (No. 86-276 Cross-Pet. 6), and "the Vermont and Pennsylvania decisions cannot both be correct interpretations of the Commerce Clause" (*id.* at 8).[3]

2. ***Discriminatory Effect.***

It is our further submission that, wholly apart from the objection that the incidence of the axle tax has fallen

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[3] Appellees seek (Mot. to Dis. 15) to distinguish the rulings of the Maine and New Hampshire courts on the ground that the taxes at issue in those cases were, in contrast to the Pennsylvania and Vermont taxes, not facially neutral. They fail to perceive that this distinction is completely irrelevant to the basis on which they defend the axle tax—*viz.*, that it is permissible to adopt a tax falling solely on out-of-state truckers if that tax redresses a previously existing imbalance arising from the incidence of other taxes or fees on locally-registered vehicles. Whatever its merit, that argument plainly applies whether the challenged tax is facially discriminatory or facially neutral; accordingly, the decisions of the Maine and New Hampshire courts are flatly inconsistent with appellees' defense of the axle tax.

exclusively on vehicles registered outside Pennsylvania, both the axle tax and the marker fee operate in a manner that effectively discriminates against interstate commerce by advantaging carriers that conduct most of their operations within Pennsylvania. These carriers, which turn out to be principally ones whose vehicles are registered in Pennsylvania, are able to spread the fixed cost of the tax over a larger base of Pennsylvania operations, thereby achieving dramatically lower per-mile tax costs than their out-of-state counterparts. The Jurisdictional Statement incorporated by reference (J.S. 24-25) the arguments made with respect to the identical issue in the Jurisdictional Statement in *American Trucking Associations, Inc.* v. *Gray*, appeal docketed, No. 86-358 (U.S. Sept. 3, 1986). Most of appellees' responses to this contention are dealt with in the Reply Brief being filed contemporaneously in *Gray*. There are three additional points that require response here.

a. Appellees contend (Mot. to Dis. 21-22) that mileage-related highway taxes impose "added administrative costs" and thus are not "a workable alternative to flat taxes." In support of this they assert (*ibid.*) that only a small percentage of vehicles are required to report their mileages for purposes of Pennsylvania taxes and that New York incurs substantial administrative expenses in connection with its mileage-based tax.

It is hard to take this contention seriously. Appellees have apparently overlooked the fact that Pennsylvania, like all other states, already collects mileage-related highway taxes—namely, motor fuel sales and use taxes. Moreover, all interstate carriers that pay the axle tax are also subject to the fuel use tax, whether their vehicles are registered in Pennsylvania or outside it. Compare 75 Pa. Cons. Stat. Ann. §§ 9901 *et seq.* with 72 Pa. Cons. Stat. Ann. §§ 2617.1 *et seq.* Thus, while there may be some intrastate carriers that currently file no mileage reports, appellees surely err when they assert (Mot. to Dis. 21)

that most motor carrier vehicles need not make such filings in Pennsylvania. In any event, it seems indisputable that if the revenues now raised by the axle tax were instead raised by an increase in the fuel sales and use taxes (which are nondiscriminatory because they are reasonably related to the highway wear and tear motor carrier operations actually cause), the discrimination inherent in the flat tax could be eliminated without a penny of additional administrative cost for the State.[4]

b. Second, appellees take the liberty (Mot. to Dis. 23-24) of recharacterizing our argument as being addressed exclusively to the question of excessiveness. In fact, appellants have never challenged the *level* of either the marker fee or the axle tax. Rather, as the Pennsylvania Supreme Court recognized (J.S. App. 25a & n.15), appellants have argued that non-proportional highway taxes like the axle tax violate both the anti-discrimination (third prong) and the fair relationship (fourth prong) requirements of *Complete Auto*. Appellees are quite mistaken in their apparent supposition that the Commerce Clause is not violated by a discriminatory tax so long as the tax is not excessive.

c. Finally, appellees carry out their theme by suggesting (Mot. to Dis. 24-25) that if a tax imposed by any state—however much it may discriminate against inter-

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[4] While it is true that New York has a weight-mileage tax, the adoption of which could entail some additional administrative burden for Pennsylvania, appellees err in ascribing New York's tax administration expenses principally to that tax. They overlook the fact that "[t]he truck mileage tax and the fuel use tax are reported on one report form." Amended Affidavit of Joseph H. Reohr, Jr., at 10, attached as Exhibit B to the defendants' motion for summary judgment in one of these cases (No. 267 C.D. 1983). Thus, much of the administrative expense referred to would likely be incurred in any event in administering the fuel use tax. Moreover, because fuel taxes are comparably effective in fairly distributing the burden of maintenance among highway users, we have not contended that Pennsylvania must adopt a weight-mileage tax to rectify the discriminations present in its existing system. See *Gray* J.S. 21-22.

state commerce—is not excessive, no attention need be paid to concerns about the cumulative impact of the adoption of such taxes by many states in which the affected interstate businesses operate. This contention runs directly counter to the basic protective purpose of the Commerce Clause and is answered in the Jurisdictional Statement in *Gray* (at 18-19).[5]

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[5] A similar issue is before this Court in *National Can Corporation* v. *State of Washington, Department of Revenue*, prob. juris. noted, No. 85-2006 (U.S. Oct. 6, 1986). That case involves a tax on wholesaling within Washington and another of equal size on manufacturing in the State. Appellants in that case are companies that either manufacture goods in Washington for sale in other states or manufacture outside Washington for sale in that State. The tax scheme is attacked as discriminatory because a business that both manufactures and sells within Washington need pay only one of the taxes; it is defended as non-discriminatory on the ground that exactly the same tax is paid by both interstate and intrastate businesses. The discriminatory impact of the tax at issue in *National Can* becomes fully evident only upon consideration of the effect of adoption of an identical tax by the other states in which the appellants do business, the result of which would be to double the tax cost of interstate ventures as compared to their intrastate competition.

It is well settled that the potential cumulative burdens of adoption of similar taxes by more than one state must generally be considered in determining questions of discrimination under the Commerce Clause. See cases cited at *Gray* J.S. 18-19. The kind of tax structure involved in *National Can* would therefore not ordinarily be countenanced; the question in *National Can* is whether there is an exception to this principle in the specific context of the compensatory tax doctrine. Here, however, the State has disclaimed reliance upon the compensatory tax doctrine. Moreover, in contrast to *National Can*, this case is not one where the tax is or could be defended on the ground that it imposes precisely equal burdens on interstate and intrastate commerce. While a reversal in *National Can* would be damaging to the already weak position of the appellees in this case, an affirmance would not sustain the validity of the Pennsylvania tax.

Respectfully submitted.

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